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Issue Date: 20 December 2006

Case No.: 2005-LHC-00076

OWCP No.: 07-113759

In the Matter of:

C. W., Sr.,
Claimant,

v.

NORTHROP GRUMMAN SHIP / AVONDALE DIVISION,
Employers.

Appearances: Edward F. Bass, Esq.
For Claimant

Frank J. Towers, Esq.
For Respondent

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq* ("the Act"). The Act provides compensation to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. Claimant brought this claim against his former employer, Northrop Grumman Ship/Avondale Division ("Employer") for a back injury he sustained on March 2, 1989. Employer has paid compensation benefits voluntarily from the date of injury, at a rate of $240.53.

In 1992, and again in 1999 until 2006, Claimant served as an Alderman of Ward 2 in Jeanerette, Louisiana. A dispute arose concerning the status of this position.[1] Employer asserts that this elected position constitutes suitable alternative employment, which changes the extent of Claimant's disability from total to partial. Claimant counters that he is still entitled to permanent and total disability payments because the alderman position has no mandatory duties or time requirements. He also contests Employer's calculation of his average weekly wage.

On April 24, 2006, I convened a formal hearing in Lafayette, Louisiana, at which time the parties had a full and fair opportunity to present evidence and arguments. The following exhibits were admitted into evidence: ALJ exhibits (AX) 1–3; joint exhibits (JX) 1–4a, 5-23, 25-26. Claimant testified on his own behalf.

STIPULATIONS

The parties stipulate and I find:

1. Jurisdiction exists under the Act.

2. The claim was timely noticed and filed under Section 12 of the Act.

3. At the time of the injury, an employer-employee relationship existed between the parties.

4. The alleged injury arose out of and in the course of Claimant's employment.

5. Claimant is entitled to compensation and medical benefits.

ISSUES

1. The date of maximum medical improvement.

2. Whether Claimant's position as an elected alderman constitutes sheltered employment.

3. Claimant's wage-earning capacity.

4. Whether Employer must pay attorney's fees and interest on the compensation award, if any.

FINDINGS OF FACT

Background

[1] Employer controverted the claim on September 1, 2004.

In 1969, Claimant began working for Employer as a sandblaster. Over the next twenty years he worked his way up to become a paint foreman. Hearing Transcript ("TR") at 14. On March 2, 1989, Claimant felt a "tingle" in his back after lifting a 300-350 pound pump with two other employees. TR at 17-9. He stopped working and soon afterwards began treatment for back pain with Dr. Louis Blanda, M.D., an orthopedist. TR at 20; JX 19 at 8. Dr. Blanda restricted him from working on August 28, 1989. JX 3 at 193. On April 18, 1990, Claimant underwent the first of two back surgeries. TR at 20.

Claimant did not return to work for Employer, but was elected in July of 1991 to serve a four-year term as an alderman, beginning in 1992.[2] JX 1 at 9. His duties included monthly meetings that were an hour to an hour-and-a-half long. TR at 31. Claimant explained he could not sit throughout entire meetings; he needed to get up or use his elbows propped on a desk to hold his weight. JX 15 at 19. He further claimed that he did not need to attend the meetings if he did not feel up to it, and that he missed several for health reasons. He had no staff, no office, and no regular office hours. TR at 34-35. He took phone calls from constituents when he chose to do so, and referred their concerns to the public director or the mayor. JX 15 at 41. Claimant testified that, "[a]s an alderman I could sit at home. I don't have to do, I mean nothing." TR at 34.

Claimant held this position for a year and a half, but resigned when an incident in town called for multiple meetings during the month that his back pain prevented him from attending. JX 15 at 18-9. Claimant did not work and held no civic position until his constituents re-elected him in 1999. He ran unopposed during this last election, so he did not have to campaign. JX 15 at 30. He will continue to serve as alderman until his last term expires in 2007. TR at 29. He testified that he will not run for an additional term. JX 15 at 45.

In late 2001, Claimant obtained a job through the Sheriff of Iberia Parish. TR at 21-2. He performed light-duty work, such as bringing meals to the inmates and escorting them to the doctor or dentist. TR at 23. About seven months after he began his job, Claimant quit working because he experienced an increase in back pain and occasionally lost balance while walking. JX 15 at 68. On May 7, 2002, Dr. Blanda recommended that Claimant stop working. JX 19 at 281. On September 18, 2002, Dr. Blanda performed a second surgery on Claimant's back. *Id.* at 284. Claimant continued to serve as an alderman after this surgery, but has not returned to any other work.

Summary of Medical History

Dr. Blanda

Dr. Blanda performed the first surgery on Claimant's back involving a Gill laminectomy and posterior lateral fusion at L-5, S-1. JX 19 at 8. On January 23, 1992 he reported that Claimant had reached maximum medical improvement ("MMI"). JX 19 at 16. One week later he released Claimant to light-duty work on a permanent basis. *Id.* at 17. On August 11, 1992,

[2] It is assumed that Claimant began his alderman duties on January 1, 1992 because his social security records show that he had no income in 1991, but that he earned the full yearly salary of $5,100 in 1992. JX 2 at 32.

Claimant returned to Dr. Blanda after he awoke one morning with excruciating pain in his back and radiating down his legs. *Id.* at 18. On October 15, 1992, Dr. Blanda recommended that Claimant avoid any type of work. *Id.* at 20.

On January 14, 1993, Dr. Blanda determined that the fusion in Claimant's back was defective. TR at 71. During the months thereafter, Claimant's back remained painful, but he declined additional surgery on Dr. Blanda's advice that the fusion could heal over time. JX 19 at 25. By June 3, 1993, Dr. Blanda found that the fusion had healed, but despite this structural development, he acknowledged Claimant's continuing pain. He advised that Claimant seek treatment at a pain clinic and begin a rehabilitation program. *Id*.

On July 10, 1993, Claimant was involved in a car accident that aggravated his back injury. He recovered by March 15, 1994. JX 19 at 28, 32. Dr. Blanda did not foresee the need for additional surgery, and he speculated that vocational rehabilitation would be successful. *Id.* at 44.

Claimant's symptoms worsened, however, in 1997. Dr. Blanda re-evaluated him because recent tests showed progressive problems with his spine. JX 19 at 279. Claimant complained of increasing back and leg pain and numbness down his legs. *Id.* Based on an MRI taken in May of 1997, Dr. Blanda found changes indicating either dissolution of Claimant's fusion or that it had not completely healed. *Id*. Claimant also had developed spinal stenosis. *Id.* at 317.

By June 4, 2002, Dr. Blanda found that Claimant's fusion had collapsed. JX 18 at 284. Claimant underwent a second surgery on September 18, 2002, involving a lumbar fusion at L4-5, L5-S1 with pedicle screws. JX 19 at 284. After his second surgery, Claimant continued to suffer back and leg pain, and numbness in his legs. JX 18 at 327-42. At no time after his second surgery did Dr. Blanda recommend that he return to work. On December 23, 2004, he noted that Claimant has severe hypertension and diabetes, and he determined that it was not feasible for him to return to work or to complete another functional capacity evaluation. JX 19 at 342. He concluded that Claimant was permanently and totally disabled.[3] JX 19 at 340.

Dr. Hodges

Daniel L. Hodges, M.D., is a pain management specialist. JX 18 at 4. He is Dr. Blanda's partner at the Lafayette Bone and Joint Clinic. JX 18 at 8. Dr. Blanda referred Claimant to him in 1994, but Claimant continued treatment with both physicians for the next ten years. JX 19 at 295. On December 15, 1994, Dr. Hodges recommended that Claimant undergo a functional capacity evaluation, in which it was later reported that Claimant was capable of working medium-duty jobs. JX 12, 18 at 49. Upon review of this report, Dr. Hodges thought was a bit overrated; he limited Claimant to light/light-medium duty jobs. JX 18 at 60.

On April 25, 2000, Dr. Hodges assigned permanent work restrictions at the sedentary level and opined that it would be difficult for Claimant to find employment. JX 7 at 10. On

[3] On June 16, 2005, Dr. Blanda reiterated that Claimant was "probably at MMI" but that he would defer to Dr. Hodges' opinion. JX 7 at 27.

October 8, 2003, he suggested that Claimant seek social security disability because he did not see him returning to any job. JX 18 at 97-98. He testified, that there was "really no way [Claimant] can ever go back to work," adding that, "I think he would have clearly gone back to work if he could, but I just felt it was next to impossible." JX 18 at 98. He also found that Claimant was permanently and totally disabled. JX 18 at 121.

Evaluating Physicians

Dr. Connolly

On June 8, 1989, Claimant underwent an evaluation by Edward, S. Connolly, M.D., a neurosurgeon, who found no evidence of disc herniation and who determined that Claimant would be able to return to light duty work in the future. JX 9.

Dr. Humphries

On November 25, 1992, Claimant was evaluated by John R. Humphries, M.D., an orthopedist who thought that Claimant's CT scans were inconclusive as far as showing a solid fusion. He noted that it appeared as though one side of Claimant's fusion "is a take and the other is not." After Claimant's first surgery, he opined that it was "probably possible" that Claimant could do some sort of light work. JX 10.

Dr. Gidman

On November 30, 2005, Gregory Gidman, M.D., an orthopedist, evaluated Claimant. He found that Claimant's x-rays showed a solid fusion, and he concluded that Claimant could work light duty. JX 17 at 4. He also reported that Claimant's past medical history is negative for any heart, lung, liver or kidney problems or diabetes. JX 17 at 3.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953). A judge may evaluate credibility, weigh the evidence, draw inferences, and need not accept the opinion of any particular medical or other expert witness. *Atlantic Marine, Inc. & Hartford Accident & Indem. Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

Generally, the opinion of a treating physician is accorded greater weight than that of a non-treating or consulting physician. *Conoco, Inc. v. Director, O.W.C.P.*, 194 F.3d 684, 688 (5th Cir. 1999). The evaluations by Drs. Connolly and Humphries carry little weight because they were taken seventeen and fourteen years ago, respectively. Dr. Gidman's conclusion that Claimant could return to work is likewise unpersuasive because it does not take Claimant's hypertension and diabetes, into account. The undersigned therefore rejects the opinions of these evaluating physicians in favor of Drs. Blanda and Hodges, each of whom has served as Claimant's treating physician and had a greater opportunity to observe Claimant's condition.[4]

[4] Dr. Hodges became Claimant's primary treating physician in September of 2004. JX 19 at 295.

Nature and Extent of Disability

The claimant has the initial burden to establish the nature and extent of his disability. *Trask v. Lockheed Shipbuilding and Construction Co*., 17 BRBS 56, 59 (Feb. 14, 1985). A disability will be considered permanent if the employee's condition reaches the point of MMI, or if his impairment has continued for a lengthy period and appears to be of a lasting or indefinite duration. *James v. Pate Stevedoring Co*., 22 BRBS 271, 275 (1989); *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Medical evidence must establish the date at which the employee's condition will not further improve. *Trask*, 17 BRBS at 60.

The records shows that Claimant's treating physicians identified multiple dates for MMI over the course of his treatment. Dr. Blanda determined he was MMI on January 23, 1992, after his first surgery. In 1994, Dr. Blanda determined that Claimant did not need further surgery and he speculated that Claimant would improve. His prognosis was inaccurate, however. Claimant's pain symptoms increased in 1997. At that point, Dr. Blanda opined that Claimant's fusion had either dissolved or failed to heal completely, which he eventually addressed by re-operating on Claimant's spine in 2002. On October 8, 2003, following Claimant's second surgery, Dr. Hodges found that Claimant was not a candidate for additional surgery, that his chronic and acute pain would continue indefinitely, and that Claimant could not likely re-enter the job market. JX 7 at 14. On December 17, 2003, he explained that Claimant was "basically permanent and total with regard to his disability." *Id.* at 15. Dr. Blanda again reported that Claimant was permanently disabled on December 23, 2004, but he recognized Dr. Hodges as Claimant's primary treating physician as of September of 2004. JX 19 at 295, 340. Dr. Hodges explicitly stated that Claimant "is probably MMI" on June 21, 2005. *Id.* at 27.

Despite the temporary fluctuations in Claimant's pain, the undersigned finds that January 23, 1992 is the date of MMI because Claimant's condition does not need to be static for him to be permanently disabled. *See Mills v. Marine Repair Serv*., 21 BRBS 115, 117 (1988); *Watson*, 400 F.2d at 654 (finding a condition permanent even where there is a remote or hypothetical possibility that the employee's condition may improve at some future date). Anticipated additional surgery precludes a finding of permanency where no physician has concluded that a claimant's condition has reached MMI, which is not the case here. *See Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986) (explaining that the mere possibility of future surgery, by itself, does not preclude a finding that a condition is permanent). Although Claimant actually underwent a second surgery, rather than merely anticipated one, it occurred a decade after Dr. Blanda first determined that he had reached MMI. Taking all of the evidence of Claimant's recovery into consideration, it is clear that he did not heal as expected. His impairment continued for a lengthy period and has been of an indefinite duration. It is therefore inappropriate to characterize his disability from the date of his injury in 1989 until October 8, 2003 or later as temporary.

Total Disability

Total disability is the complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, the claimant must prove that he is unable to perform his usual employment due to his work-related injury. *See Elliott v. C & P Telephone Co*., 16 BRBS 89 (Jan. 20, 1984). Once an employee meets this burden, it is presumed that he is totally disabled. Here, Claimant is entitled to this presumption because the parties agree that he cannot return to his usual employment.

Suitable alternative employment

The employer may rebut this presumption by showing that there is suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031 (5th Cir. 1981). This is established by identifying specific jobs that are realistically available to the employee given his technical and verbal skills, and the likelihood given his age, education, and background that he would be hired if he diligently sought the work. *Id.* at 1042-43. On September 3, 1991, the Employer hired a vocational rehabilitation consultant who began to explore alternative employment opportunities for Claimant. JX 25 at 123. This consultant conducted multiple searches over the next ten years. JX 25. The record indicates that the consultant identified potential positions in November of 1995, but the outcome of these searches is unknown. *Id.* at 42. Consequently, Employer presents no other job as suitable besides the alderman position.

Claimant insists that his service as an alderman was not really a job, despite his yearly salary of $5,100. JX 2. In the alternative, he argues that even if it were a job, it could not be considered part-time work because it does not require regular hours, and that it is merely sheltered employment.

The Fifth Circuit has held that the identification of one job may be sufficient, but only under certain circumstances. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116, 121-22 (CRT) (5th Cir. 1991). The employee must be highly skilled, the job found by the employer must be specialized, and only a small number of workers in the local community can possess suitable qualifications. *Id.* Employer asserts that Claimant's service as an alderman is enough to rebut his entitlement to total disability because it is a "vocation of significance and prominence within the community" where he is responsible to 1,500 constituents concerning a variety of issues such as road work and repair, sewerage and water. TR at 40. Although Claimant served his constituents in Ward 2 by representing them in monthly meetings and relaying their concerns to appropriate city officials, he possessed no specialized public-service skills. His vocational background is in painting and sandblasting. Therefore, *P & M Crane* does not control.

In all other situations not governed by *P&M Crane*, an employer seeking to prove suitable alternative employment must show that a range of jobs exist, not just one. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc*., 24 BRBS 154 (1990); s*ee also Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). If Claimant had not actually assumed the alderman duties, and drawn a salary for doing so, then no further analysis would be necessary because Employer did not identify any other job. Here, however, it does not matter how many additional jobs Employer identifies if being an alderman impacts Claimant's wage-earning capacity and if it is necessary work that Claimant performs capably. Likewise, it does not matter

whether Claimant's hours were regular to determine whether the alderman position is a part-time job. Wages must be sufficiently regular to determine post-injury earning capacity, not hours. *See Edwards v. Director, O.W.C.P.,* 999 F.2d 1374, 1375 (9th Cir. 1993). Claimant earned a regular salary for his service. Consequently, the only basis by which he can preserve his claim for total disability is if his work for the Town of Jeanerette is sheltered employment.

Sheltered Employment

Sheltered employment is an exception to the general rule that reserves total disability benefits to workers who have a total loss of wage-earning capacity coupled with a physical or psychological work-related injury. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). A job is sheltered where the employee is paid even if he cannot do the work, and which is unnecessary and merely created in order to place him on the payroll. *Harrod v. Newport News Shipbuilding & Dry Dock Co*, 12 BRBS 10 (1980). An employee who earns post-injury wages is still entitled to total disability where an employer would not necessarily replace him if his job were terminated, and where he is treated with "kid gloves." *Patterson v. Savannah Mach. & Shipyard*, 15 BRBS 38 (1982). Claimant argues that his duties as alderman are sheltered because it is political service, rather than employment benefiting a public or private employer. He emphasizes that the work is entirely flexible – he could sit at home and do nothing – and that he cannot be fired if he fails to perform. He testified that all the other council members for the Town of Jeanerette have jobs in addition to this duty. TR at 33. Moreover, neither Dr. Blanda nor Dr. Hodges altered his impression of Claimant's total disability when they discovered he was performing these limited duties.[5]

The application of the sheltered employment exception does not depend on a structured schedule, or a medical doctor's view of local government responsibilities, or an absence of private profit.[6] The analysis must focus on whether the Claimant's job is necessary and whether it was created out of the employer's beneficence. Claimant ran unopposed during the last election, but he presents no evidence whether his seat would have remained vacant had he declined the position. He mentioned, however, that he asked to be replaced when he resigned in 1993. JX 15 at 19. This suggests that an alderman is necessary to the operations of Ward 2. He was re-elected, so it appears that he performed his duties satisfactorily. Likewise, there was no evidence that Claimant was elected because of a community gesture to provide him with productive work, or that he had special accommodations that were not available to the other council members. Given that everyone else on the council worked jobs in addition to this public service, it stands to reason that the same flexibility was available to all of them, not just one with

[5] When questioned about Claimant's service as an alderman, Dr. Blanda explained, "I would not consider that working." JX 19 at 286-91. Dr. Hodges testified that knowledge this position does not change his impression that Claimant is permanently and totally disabled; he figured it was a "community-based-effort type of thing." JX 18 at 121-22.

[6] There is no authority on point that excludes paid community service from the realm of "real jobs," although some precedent includes profitability to a private employer as a factor used to determine sheltered work. *See Peele v. Newport News Shipbuilding & Dry Dock Co*., 20 BRBS 133 (1987); *Walker v. Sun Shipbuilding & Dry Dock Co*., 19 BRBS 171 (1986).

an injury. The alderman position, therefore, is not sheltered and it constitutes suitable alternative employment.

By so finding, it is not meant to suggest that this result should be common in situations where elections determine employment. To the contrary, more often than not it would be unreasonable to establish the extent of an injured worker's disability based on his potential to keep an elected position. Claimant, however, never faced an opponent in any of the past elections. He testified that he did not campaign for past elections, and that ministers within his community assured him that he did not need to worry about having to campaign because no one would run against him. TR at 57. He stepped down in 2006 for personal reasons. JX 15 at 46. Based on the specific facts of this case, the undersigned finds that it is reasonable and fair to determine this Claimant's benefits based on his ability to perform as an elected alderman.

Average Weekly Wage

The parties dispute Claimant's average weekly wages earned while he worked for Employer. Subsections 10(a), 10(b) and 10(c) of the Act set forth three alternative methods to determine the appropriate average weekly wage of an injured worker. Subsection 10(a) applies when a claimant worked in the same employment for "substantially the whole of the year" immediately preceding the injury. Subsection 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. Calculations under Sections 10(a) and (b) are similar in that both are theoretical approximations of what the employee could ideally be expected to earn, and thus tend to give a higher figure than the claimant's actual earnings. *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982) *vacated in part on other grounds*, 462 U.S. 1101 (1983). When subsections 10(a) or 10(b) cannot be "fairly and reasonably applied," subsection 10(c) must be used. *Gulf Best Electric, Inc., v. Methe,* 396 F.3d 601, 606 (5th Cir. 2005).

Claimant was laid off on November 3, 1987, but he returned to work for the Employer on December 1, 1987. JX 14 at 3. Payroll records show that Claimant made $7.75 an hour starting on December 1, 1987; $9.29 an hour as of October 10, 1988; and $9.02 an hour as of February 27, 1989. *Id*. Claimant's gross income in 1988 was $25,938.21. JX 13. His gross income for 1989 was $5,026.38. *Id.* He represents that all of his 1989 wages were paid at the rate of $9.29 an hour, which is credible because his wage rate changed to $9.02 just 3 days before his injury. There is no evidence that there was a break in his employment from December 1, 1987 through the date of his injury, March 2, 1989.

Both parties propose calculations of Claimant's average weekly wage pursuant to subsection 10(c) because his wages changed within that last year that he worked for Employer and there are not enough payroll records to determine his average daily wage during the 52 weeks preceding his injury. *See Lobus v. I.T.O. Corp. of Baltimore*, 24 BRBS 137, 140 (1990). The undersigned agrees that there is not enough information to compute Claimant's wages pursuant to subsection 10(a). Subsection 10(b) does not apply because Claimant was employed substantially the whole of the year preceding his injury. Therefore, Claimant's wages must be calculated according to 10(c).

A judge has broad discretion in determining annual earning capacity under subsection 10(c). *Sproull*, 25 BRBS at 105. A definition of earning capacity for these purposes is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc*., 12 BRBS 410, 413 (1980). The Act explicitly provides that calculations of a claimant's average annual earnings under subsection 10(c) shall have regard for his earnings at the time of the injury. *P&M Crane Co*., 25 BRBS at 393. Accordingly, it may be reasonable to focus only on the actual earnings of the claimant at the time of injury. *Id*.; *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-345 (1988).

Claimant's calculation

Claimant proposes the following method to calculate his wages: divide $5,026.87 (gross income for 1989) by 43 (the alleged number of days Claimant worked in 1989) to yield an average daily wage of $116.90. Then multiply $116.90 by 260 (maximum days worked per year for a five-day per week employee), which equals $30,394.00 (annual wage earning capacity). Finally, divide $30,394.00 by 52 weeks, equaling an average weekly wage of $584.50.

Employer's calculation

Employer proposes this calculation instead: multiply $25,938.21 (gross income for 1988) by 307 (the alleged number of days Claimant worked in 1988), for a total of 7,963,030.40; divided by 365 (the maximum possible days Claimant could have worked in 1989), equaling $21,816.52. Then multiply $5,026.87 (gross income for 1989) by 57 (the alleged number of days Claimant worked in 1989), equaling 28,6531.59; divided by 66 (the maximum possible days Claimant could have worked in 1989), for a total of $4,341.38. Finally, add $21,816.52 (total for 1988) with $4,341.38 (total for 1989) for a sum of $26,157.90. Divide this sum by 52 weeks to get an average weekly wage of $503.04.

Actual Wage Rates

Neither party presented evidence showing how many days a year Claimant actually worked in 1988 or 1989. Generally, calculations for a six-day work week are based on a maximum of 300 possible days; for a five-day work week, the divisor is 260. *See* 33 U.S.C. § 910 (a) & (b). Claimant presents a calculation based on 260 days, suggesting a five-day work week. It is unclear how Employer determined that Claimant worked 307 days. Moreover, Employer gives no reference to support its calculations based on an employee potentially working 365 days a year.

Although no basis was given for the assumptions that Claimant worked either 43 or 57 days in 1989, Claimant's reliance on 43 days worked in 1989 makes more sense because it is the maximum days Claimant could have worked based on a five-day-per-week schedule [22 days (January) + 20 days (February) + 1 day (March) = 43]. Employer's result of 66 potential work days between January 1, 1989 and March 2, 1989 is impossible [31 days (January) + 28 days (February) + 1 day (March) = 60]. Given that it is unreasonable to expect an employee to work

every single day of the year, and that Employer failed to explain how Claimant could work 66 days out of a possible 60, (or even how he could work 57 days out of a possible 60 or 66), Employer's proposed average weekly wage is rejected.

Claimant's calculation is more reasonable than Employer's, but it is not necessarily fair because it extrapolates Claimant's potential earnings for the rest of 1989 based on an actual wage rate of $9.29 an hour. Claimant's wage rate changed on February 27, 1989. At the time of his injury, Claimant's wages were set at $9.02 an hour. Therefore, $116.90 represents Claimant's average daily wage for only the first 43 days of the year.[7] The last 217 days must reflect the reduced wages.

Multiplying $9.02 (hourly wage at time of injury) by $116.90 (average daily wage for first 43 days) yields $1,054.44. This product is then divided by $9.29 (hourly wage for the first 43 days), to get an average daily wage of $113.50. This new average wage rate is then multiplied by 217 (260 days maximum – 43 days worked at $9.29) resulting in $24,629.50 for the rest of the year. Adding $5,026.87 to $24,629.50, gives a sum of $29,656.37, which is then divided by 52 (weeks in a year). Claimant's average weekly wage, therefore, is $570.31.

Post-injury earning capacity

Claimant's post-injury earning capacity shall be determined by his actual earnings if such earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h). Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury earning capacity. *Devillier v. National Steel & Shipbuilding Co*., 10 BRBS 649 (1979). The first inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. *Randall v. Comfort Control, Inc*., 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount that fairly and reasonably represents the claimant's wage-earning capacity. *Id.* at 796-97. The second inquiry need not be made if the claimant's actual wages represent his wage-earning capacity. *Devillier*, 10 BRBS at 660.

Wage-earning capacity can be established by the suitable alternative employment identified by the employer. *See Berkstresser v. Washington Metro. Area Transit Auth*., 16 BRBS 231, 233 (1984). Post-injury earnings are more likely to be reasonable and fair if they are the result of continuous and stable employment. *Burkhardt v. Bethlehem Steel Corp*., 23 BRBS 273, 276 (1990). Here, the alderman position constitutes suitable alternative employment, for which Claimant made $5,100 a year. He has held this job continuously for the past seven years. Drs. Blanda and Hodges acknowledged that he could do this type of work, but no other job. This testimony is credible, considering that the flexibility of the alderman job allowed Claimant to work as much or as little as he could.

[7] Although the wage rate changed on February 27, 1989, Claimant represents that all of his 1989 wages were paid at $9.29 an hour. Therefore, these calculations include February 27, 28, and March 1 within the higher average daily wage rate of $116.90.

The undersigned is aware that Claimant did not work as an alderman for part of the year in 1993, and that he did not serve at all from the day he resigned in 1993 until he was re-elected in 1999. It is also noted that Claimant will not run again after his term expires in 2007. His resignation in 1993 was based on his subjective belief that he was not adequately serving the community, rather than objective evidence that he was incapable of performing this job. He chose not to serve another term because he no longer believes that it is worthwhile. While both of these choices speak of Claimant's noble intent to take his duties seriously, neither prove that he was unable to do his job adequately, or that he could not continue to do so. Thus, $5,100 a year (or $98.08 a week), as adjusted for inflationary effects, reasonably and fairly represents Claimant's post-injury wage-earning capacity. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

It is also recognized that Claimant earned $4,620 for seven months of employment with the Sheriff of Iberia. EX 1 at 4. This income does not fairly represent Claimant's wage-earning capacity because he could not perform the job consistently. Claimant's back pain prevented him from continuing the job, and neither of his treating physicians released him to return to this work after his second surgery. This income is excluded from the wage calculations for these reasons.

Adjustment for inflation

When post-injury wages are used to establish wage-earning capacity, the wages earned in the post-injury job must be adjusted to represent the wages which that job paid at the time of the claimant's injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Here, there is no evidence in the record as to the wages paid by the City of Jeanerette in 1989, when Claimant stopped working for Employer. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") should be applied to adjust post-injury wages downward when the actual wages paid at the time of the claimant's injury are unknown. *Id*. *See also*, 33 U.S.C. §906(b)(1)-(3). Accordingly, I find that Claimant's post-injury wage earning capacity should be adjusted downward by reference to the percentage increase in the NAWW.

Interest on Past Due Benefits

Claimant is entitled to interest on any accrued, unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 594 F.2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.,* 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.,* 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation owed by Employer should be included in District Director's calculations of the amounts due.

Attorney's Fees

Pursuant to Section 28(a) of the Act, a claimant who engages an attorney in the "successful prosecution" of his claim may collect a reasonable attorney's fee from his employer.

Generally, counsel has thirty days from the issue date of a decision and order to submit an application for attorney's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen days following the receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is hereby **ORDERED**:

1. Employer shall pay Claimant compensation for temporary total disability from March 2, 1989 through December 31, 1991, based on an average weekly wage of $570.31.

2. Employer shall pay Claimant compensation for temporary partial disability from January 1, 1992 until January 22, 1992, based on the difference between Claimant's average weekly wage of $570.31 and his weekly, post-injury wages, adjusted downward by reference to the percentage increase in the NAWW for inflation.

3. Employer shall pay Claimant compensation for permanent partial disability from January 23, 1992 through the present and continuing. These benefits shall be based on the difference between Claimant's average weekly wage of $570.31 and his weekly, post-injury wages, adjusted downward by reference to the percentage increase in the NAWW for inflation.

4. Employer is liable for interest on any accrued, unpaid compensation benefits at the statutory rate described in 28 U.S.C.A. § 1961.

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Russell D. Pulver
Administrative Law Judge